

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7076

United States Court of Appeals

FOR THE SECOND CIRCUIT

ZIMMEL ASSOCIATES, a New York Limited Partnership,
Plaintiff-Appellant,
against

WARNER BROS. INC.,
Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

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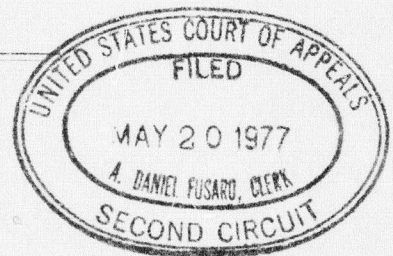


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ZIMMEL ASSOCIATES, a New York Limited Partnership,	:	
	:	
Plaintiff-Appellant,	:	
	:	
-against-	:	No. 77-7076
	:	
WARNER BROS. INC.,	:	
	:	
Defendant-Appellee.	:	
	:	

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PRELIMINARY STATEMENT

This brief is submitted on behalf of defendant-appellee Warner Bros. Inc. ("Warner"). This is an appeal from an Order of the United States District Court for the Eastern District of New York, dated January 12, 1977, which dismissed appellant's antitrust cause of action for lack of standing and appellant's unfair competition cause of action for lack of federal jurisdiction. (A 42.)*

* All "A" references are to pages of appellant's appendix. All "¶" references are to paragraphs of the Complaint which is set forth at A 1 to A 11.

STATEMENT OF THE ISSUE PRESENTED

Whether the court below correctly decided that plaintiff-appellant, a non-distributor, non-exhibitor, licensor of a motion picture leased to another entity for exclusive distribution, exhibition and exploitation, lacks standing to invoke the antitrust laws for an alleged attempt to monopolize "the distribution and exploitation of motion pictures dealing with the concept of demonic possession of individuals". (§§21-24.)

THE ALLEGATIONS OF THE COMPLAINT

The Complaint alleged two causes of action, each of which sought to recover treble damages allegedly sustained by appellant as the non-distributor and non-exhibitor licensor of a film entitled "Beyond the Door" (the "Film"). The only "business" in which appellant alleged it engaged with respect to the Film was granting an exclusive license to Film Ventures International ("Film Ventures") to distribute the Film. (§7.)

APPELLANT'S ANTITRUST COUNT

In its first cause of action, appellant sought to obtain treble the amount of actual damages claimed by it as a result of having received no payments under its license agreement with Film Ventures. (§26.) Appellant conceded, and the lower court found, that in December 1974 it granted Film Ventures an "exclusive license to distribute, exhibit, and otherwise exploit" the Film "in return for the right to receive a portion of the gross receipts" from the Film's theatrical distribution by Film Ventures. (§§7-8; A 43.) Although a copy of this agreement was not attached to the Complaint, nor did appellant provide the Court with a copy of this agreement in the proceedings below, there was no allegation that appellant reserved any right whatsoever to participate in or control the distribution or exhibition of the Film. Thus, any monies which might be payable to appellant would necessarily result from the efforts and business acumen of Film Ventures in distributing the Film to exhibitors -- efforts in which appellant admittedly plays no role. Simply stated, unless the distributor Film Ventures and the exhibitors of the Film are successful in their endeavors,

no box office receipts would ever be generated.

The complaint then alleged that Warner attempted to maintain or acquire monopoly power "with respect to the distribution and exploitation of motion pictures dealing with the concept of demonic possession" of individuals.

(¶¶21, 24.) Appellant pleaded that Warner's acts and conduct constituting such an attempt were its institution of legal actions seeking adjudication of the infringement by certain distributors and exhibitors of the Film, including Film Ventures, of Warner's copyrights in the film "The Exorcist" and in advertising materials created to promote "The Exorcist." (¶¶13-17; A 15-16.)

Appellant is neither a distributor nor an exhibitor of the Film. As the Court below found, appellant is merely the "owner of the American rights in and to" the Film which is licensed to Film Ventures for exclusive distribution, exhibition and exploitation. (A 42-42.) Nonetheless, in an attempt to invoke the treble damage provisions of the antitrust laws, appellant claimed, as it had to, direct and proximate injury resulting from Warner's conduct. Thus, appellant pleaded that it failed to receive payments

under its agreement with Film Ventures; lost a portion of the gross box office receipts which would have been received from Film Ventures' distribution of the Film; and suffered a decrease in the value of its investment in the Film. (§26.)

APPELLANT'S UNFAIR COMPETITION COUNT

For its second cause of action, appellant merely realleged each paragraph of its antitrust count. (§28), summarily stated that such acts constituted "unfair competition" by Warner (§§29, 30, 31) and sought treble the amount of damages allegedly sustained by reason thereof. (§28.) Federal jurisdiction over this cause of action was asserted to be diversity of citizenship. (§29.) However, the Complaint clearly alleged that appellant is a New York limited partnership (§1), and Warner has a principal place of business in New York. (§2.)

RELATED ACTIONS

The copyright infringement action commenced by Warner against distributor Film Ventures and two exhibitors of the Film, referred to in paragraph 13 of the Complaint,

is presently pending. (Warner Bros. Inc. v. Film Ventures International, No. 72-2774 (C.D. Cal.) [Judge David W. Williams])). (A 15.) Appellant is not a party to that action nor has it sought to intervene in that action. However, even at an early stage of that litigation, Judge Williams clearly found merit in Warner's claim, for he granted, in part, its application for pendente lite injunctive relief against Film Ventures. (A 16-18.) Indeed, with respect to the infringement of Warner's promotional material by theatrical posters and advertisements used in promoting the Film, Judge Williams has required defendants to discontinue the use of the material complained of "or any similarly deceptive ads." (A 18.)

Moreover, distributor Film Ventures has sued Warner in an action presently pending in the United States District Court for the Northern District of Georgia, Atlanta Division, entitled Film Ventures International, Inc. v. Warner Bros. Inc., No. 75-2297 A (N.D. Ga.) (the "Film Ventures Action").* The subject matter of the Film Ventures

* A copy of the Complaint in the Film Ventures Action appears at A 19 to A 27.

Action is identical to the acts complained of by appellant herein -- Warner's institution of copyright infringement actions against Film Ventures and its co-defendants, exhibitors of the Film. In addition, the damages sought by Film Ventures duplicate the sums sought by appellant herein. Thus, Film Ventures alleges that under its "exhibition contract, [Film Ventures] is entitled to receive a certain percentage of the box office receipts from the theatrical exhibition of [the Film], as its fee." (A 20.) Appellant alleges in its brief, without the benefit of any record support, that it is entitled to a portion of the box office receipts received by Film Ventures: "The distributor [Film Ventures] receives anywhere from 25 percent to 60 percent of the gross ticket sales as his gross film rental which he then shares 50/50 with the plaintiff." (Appellant's brief, p. 10.) Accordingly, appellant seeks to recover a percentage of box office receipts which are included in the amounts claimed by Film Ventures.

THE DECISION BELOW

After summarizing the allegations of the Complaint,

Judge Pratt squarely held:

"In the instant case, plaintiff granted an exclusive license to Film Ventures to distribute, exhibit, and otherwise exploit 'Beyond the Door'; plaintiff's interest is limited to a right to receive a percentage of the gross receipts from Film Ventures' distribution of the film. Thus, Zimmer Associates is now seeking a treble damage recovery for precisely the same indirect injury which the Trico court held not actionable under the antitrust laws, viz., 'loss of royalties on sales that might have been made by its licensees save for the antitrust violations of the defendant.' Productive Inventions, Inc. v. Trico Products Corp., supra, 224 F2d at 679. And, as in Trico, plaintiff has no standing under the antitrust laws to complain of its incidental loss of profits resulting from the activities of Warner Brothers directed at Film Ventures.

Zimmer Associates as licensor fits squarely within the category announced by Trico and since endorsed by the Second Circuit." (A 46-47.)

Judge Pratt then immediately cited the authorities in this Circuit so holding. (A 47.)

We submit that in so deciding, Judge Pratt correctly applied the law in this Circuit to the facts in this case. While appellant is understandably reluctant to deal with the binding precedents enunciated in Judge Pratt's decision, the facts of this case fall squarely within the

established law in this Circuit; they present no reason to depart from such law.

In addition to appellant's lack of standing, in the proceedings below Warner challenged the legal sufficiency of the first count of the Complaint on two alternative grounds: (1) assuming arguendo that this appellant has standing to sue, Warner's use of litigation to protect its copyrights is within the so-called Noerr-Pennington exemption from antitrust liability, and (2) motion pictures detailing the demonic possession of individuals is not a "part" of trade or commerce within the meaning of the Sherman Act. Since Judge Pratt dismissed appellant's Complaint for lack of standing, he found it unnecessary to reach Warner's alternative bases for dismissal. We submit that even if this appellant has standing, the Noerr-Pennington doctrine and this appellant's manifest inability to plead or prove a product market mandate dismissal of the Complaint.

ARGUMENT

POINT I

APPELLANT-LICENSOR HAS NOT BEEN INJURED
IN ITS BUSINESS OR PROPERTY WITHIN THE
MEANING OF SECTION 4 OF THE CLAYTON ACT
AND ACCORDINGLY LACKS STANDING TO SUE.

Appellant's appeal from the dismissal of its Complaint seeking treble damages for lack of standing poses no novel question of law for this Court. Over the last twenty years this Court has confronted the standing issue raised herein in at least eight cases in each of which this Court affirmed resolution of the standing question against the plaintiff in summary fashion at the pleading stage. This Court has consistently held that only those persons who are in the "target area" of the alleged offense and whose commerce has been directly injured "by reason of" the alleged violation may invoke Section 4 of the Clayton Act (15 U.S.C. §15). Incidental harm which may come to persons by virtue of their relationship to those directly injured does not give rise to standing to sue for Clayton Act relief. Fields Productions, Inc. v. United Artists Corp., 432 F.2d 1010 (2d Cir. 1970), affirming on the opinion below, 318 F. Supp. 87

(S.D.N.Y. 1969), cert. denied, 401 U.S. 949 (1971). Accord, Calderone Enter. Corp. v. United Artists Theatre Circuit, 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972); Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971); SCM Corp. v. Radio Corporation of America, 407 F.2d 166 (2d Cir.), cert. denied, 395 U.S. 943 (1969); Bookout v. Schine Chain Theatres, 253 F.2d 292 (2d Cir. 1958); Productive Inventions v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), cert. denied, 350 U.S. 936 (1956); Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151 (2d Cir.), cert. denied, 419 U.S. 968 (1974); Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir. 1975), cert. denied, 423 U.S. 1073 (1976).

As Judge Mansfield stated in one of the most recent standing cases before this Court, Calderone Enter. Corp. v. United Artists Theatre Circuit, supra:

"In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have 'standing' to sue for treble damages under §4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust

conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly, we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves." Id. at 1295.

Recognizing that there must be some limit on the number of times a defendant can be exposed to treble damages for a single antitrust transgression, this Court has consistently denied standing to those plaintiffs whose injuries occur by virtue of their relationship with "targets" and has consistently withheld the windfall of treble damages from plaintiffs whose alleged injury consists of an incidental diminution in the monies they receive or hope to receive from a business or property exclusively exploited by another. As this Court stated in Trico, one who claims "loss of royalties on sales that might have been made by its licensee save for the antitrust violations of defendant . . . has no standing under the antitrust laws to complain of the incidental loss of royalties by activities . . . not directed at it." 224 F.2d at 679-680.

As all other plaintiffs appealing the dismissal of

their complaints on standing grounds have done, appellant herein does not dispute the law in this Circuit. Rather it attempts to distinguish the "nuances" of its case from the clear Second Circuit law. We submit that an examination of the facts in the instant case will compel this Court to conclude that Judge Pratt was correct in his determination that upon the facts of this case, "Zimmel Associates is . . . seeking a treble damage recovery for precisely the same indirect injury which the Trico court held not actionable under the antitrust laws, viz., 'loss of royalties on sales that might have been made by its licensees save for the antitrust violations of the defendant.'" (A 46-47.) This is far different from what appellant argues -- that it has been denied standing because it fits into a particular category. Rather, it is because appellant has purposefully removed itself from that area of commerce, i.e., distribution and exhibition, in which the alleged violation occurred.

Appellant's attempt to distinguish itself from the certainty of dismissal of its Complaint is two-pronged. First, it claims to have sustained non-derivative and non-

1
duplicative damages; second, it belatedly claims that it is the target of Warner's alleged anti-competitive practices. With respect to its "damages", as fully set forth below, appellant's arguments only seem to confirm that its damages are both derivative and duplicative. Its alleged losses are nothing more than a hope that clearly derives from and depends upon the distribution efforts of Film Ventures are successful.

With respect to appellant's claim that it is the target of Warner's alleged violations, the simple fact is that all claimants for treble damage recovery feel compelled to make such allegations. This Circuit long ago recognized that any plaintiff who otherwise would not be in the "target area" could snare a defendant into costly and time-consuming litigation simply by alleging that an antitrust violation, whomever else it may have victimized, was specifically intended to injure him. Accordingly, this Circuit has repeatedly held that "factual questions of motive and intent [are] not material to appellant's standing." Billy Baxter, Inc. v. Coca Cola Co., supra, 431 F.2d at 189. In the instant case, irrespective of Warner's motive and intent,

appellant has removed itself from that area of commerce at which the alleged offenses were directed. Accordingly, appellant lacks standing to sue.

- A. Appellant's alleged damages are both derivative and duplicative -- its "gross/net" distinction has no bearing on its lack of standing to sue.

Appellant's initial attempt to distinguish itself from Trico and its progeny is wholly improper in that its argument is based on a document which is not a part of the record, to wit, its agreement with Film Ventures. Thus, appellant has presented in its brief a four page purported analysis of its agreement with Film Ventures as well as a Schedule purporting to reflect the Film's gross film rentals for 1976 -- an agreement which is not before this Court and was not before Judge Pratt in the proceedings below. Indeed, we submit that appellant's failure to provide Warner and this Court with a copy of its agreement with Film Ventures warrants the drawing of an inference adverse to appellant's position herein. At the very least, this Court must disregard appellant's self-serving presentation of the agreement and any argument advanced by appellant based upon this

improper and extra-record material.

However, should this Court nonetheless consider this extra-record material, we submit that it is of no assistance to appellant in its attempt to extricate itself from the precedents established by this Court. Even appellant's self-serving presentation of its agreement with Film Ventures clearly demonstrates that its alleged damages are duplicative. Thus, while Film Ventures is entitled to the entire contracted for gross box office receipts, appellant is only entitled to a portion of receipts contracted for by Film Ventures. Indeed, evidence of the derivative and duplicative nature of appellant's claim is before this Court, to wit, Film Ventures' action against Warner seeking all of the gross receipts it would be entitled to from exhibitors, including that portion payable to appellant. (A 20.)

Essentially, appellant claims that its interest in the exhibition of the Film "would be anywhere from 12 1/2 percent to 30 percent of the gross sales price received from all tickets sold" -- "a flat percentage rate." (Appellant's brief, p. 2.) Appellant then suggests that

because "it has an interest in a percentage of the gross receipts and not a percentage of the net profits" it is somehow entitled to treatment different from that accorded every other appellant who has been denied standing to sue by this Court. (Appellant's brief, p. 4.) An examination of the settled law in this Circuit dictates otherwise -- the test is not whether appellant's receipts are characterized as "gross" or "net". Rather, the test is whether appellant was directly injured in its "business or property." The "gross/net" distinction does not alter the fact that appellant is not in the "target area" of the alleged offenses and its alleged damages are both derivative and duplicative. Simply stated, it is not the quality of the receipts but rather appellant's relationship with the source of the receipts that mandates affirmance by this Court of Judge Pratt's dismissal of appellant's Complaint.

Indeed, in almost every "standing" case heard by this Court, appellant's alleged damages consisted of "gross" receipts. In Calderone, supra, plaintiff leased three movie theatres for "an annual fixed minimum rental, plus an additional rental based upon a percentage of gross

receipts realized annually from the exhibition of motion pictures" at the three theatres it owned". (Emphasis supplied) 454 F.2d at 1294. It sought treble the amount of higher gross receipts it allegedly would have obtained but for defendant-distributors' conspiracy. Thus, the non-operating landlord in Calderone was in precisely the same position as appellant herein -- its gross receipts were allegedly diminished by anti-competitive conduct engaged in by distributors and exhibitors. The district court dismissed the complaint and this Court affirmed. In Billy Baxter Inc. v. Coca-Cola Company, supra, "franchisee-bottlers sold the beverages in their geographic territories, remitting specified royalties to Billy Baxter, Inc., based on the number of cases of their products which they sold." 431 F.2d at 185. Notwithstanding the seeming certainty of the loss incurred by Billy Baxter, the district court dismissed the complaint and this Court affirmed, holding: "[a]t no time was plaintiff any part of the marketing operations of its licensees' [A]ppellant had expressly limited itself to a level outside the economic target area of the offense." 431 F.2d at 186, 188.

Appellant's "gross/net" distinction has no legal significance; whatever the quality of a plaintiff's receipts, standing to sue is only available to those who are within the "target area" of the alleged offense. As the following discussion will demonstrate, appellant is not within the required target area and accordingly lacks standing to sue.

B. Appellant has removed itself from the "target area" of the alleged antitrust violations and accordingly lacks standing to sue.

Appellant has belatedly come to recognize the importance of "target area" in antitrust standing questions and now claims that it is the target of Warner's alleged anticompetitive practices. However, appellant's cries of "target" are nothing more than an afterthought prompted by Judge Pratt's determination to dismiss its Complaint. In its Complaint, appellant conceded that the alleged antitrust violations were directed at the distribution and exhibition of the Film. (¶¶13-18, 25.) Having now been educated by Judge Pratt's decision, appellant recognizes that it must cry "target" or be faced with the certainty of

dismissal. Appellant now claims that Warner "was trying to destroy the marketability of plaintiff's property so that the [F]ilm would not be in a position to compete with the defendant's release of 'Exorcist II'." (Appellant's brief, p. 13.) Even if these allegations are true, "marketability" is an area of commerce with respect to which appellant plays no role. Surely appellant is not suggesting that one bent on clearing a path for "Exorcist II" would care about who owned a potentially competing film. Hundreds of individuals may own such films, however, so long as such films are neither distributed nor exhibited the path for "Exorcist II" would be clear. Accordingly, if Warner's conduct was anticompetitive, the targets of such conduct were, as initially alleged by appellant, distributors and exhibitors of the Film. Indeed, the distributor Film Ventures and the exhibitors of the Film are the entities named as defendants in the California copyright infringement action, not appellant.

Moreover, this Circuit has repeatedly held that even well-pleaded allegations of a defendant's specific intent to injure a plaintiff are insufficient to support

antitrust standing. In SCM Corp. v. Radio Corp. of America, supra, SCM instituted a declaratory judgment action in the district court alleging the invalidity of a patent held by RCA and licensed to SCM and others in consideration for the payment of royalties to RCA. RCA counterclaimed for treble the loss of royalties resulting from a diminution of its royalty income from its other licensees by reason of SCM's anticompetitive acts against other RCA licensees -- SCM's competitors. RCA alleged that SCM engaged in such conduct in order to become dominant in the market and thereby force RCA to lower its royalties which would enable SCM to gain advantages over its competitors with the ultimate aim of eliminating all but one licensee, itself. Alleging that when RCA refused to capitulate SCM terminated its license agreement and commenced the declaratory judgment action, RCA claimed direct injury because SCM had "'unlawfully acquired a dominant position in the markets," and that SCM 'attempted to and has acted as a monopolist.'" 407 F.2d at 170.

The district court dismissed RCA's counterclaim for lack of standing. On appeal, RCA repeatedly argued

that SCM had specifically intended to injure RCA: "[a]s a result of the offenses alleged above, RCA [as the lawful owner of the patents] has been immediately injured * * * , in that RCA has been willfully and maliciously deprived of royalties lawfully due"; "RCA has been prevented from enjoying the full benefits of its patents and, in effect, would have prospered 'but for' SCM's acts."; and "SCM's monopolization 'if successful' will deprive [RCA] of the fruits of licensing" 407 F.2d at 170.

Notwithstanding RCA's assertions that SCM specifically intended to injure RCA, this Court affirmed the dismissal of RCA's counterclaim, holding:

"After searching for factual allegations which might bring this counterclaim within the purview of the anti-trust laws, it is difficult to escape the conclusions reached by the district court: (1) 'The injury which it [RCA] has suffered because its 63 licensees have suffered is not, under the authorities, an injury which gives it standing to sue'; and (2) 'The other injury which it has sustained, its loss of royalties and its litigation expense, is not an injury which it has sustained by reason of plaintiff's [SCM's] antitrust violations.' This is an injury which defendant [RCA] has suffered because plaintiff [SCM] challenged its patents, whether justifiably or not remains to be seen.

As to that injury, plaintiff's violations and its alleged monopolistic position, are irrelevant." (Emphasis supplied) 407 F.2d at 170.

In reviewing the reasoning of SCM and the other standing cases discussed herein, it is readily apparent that this Court and others have imposed the direct injury requirement, irrespective of alleged "intent", to avoid a proliferation of multiplicitous litigation. In SCM, this Court found:

"The nature of the injunction sought by RCA is revealing because it indicates the proper territory for an antitrust suit, if any be justified, and conversely, shows that such a suit on the facts alleged, does not lie between RCA and SCM. The acts sought to be enjoined relate to alleged impositions placed by SCM upon SCM's customers, suppliers or lessees [T]he proper parties to any suit under the antitrust laws would appear to be SCM and its customers, suppliers or lessees." 407 F.2d 169.

SCM's competitors had brought such an action and this Court commented that the point of the suit brought by SCM's competitors "is that it illustrates the district court's comment here that . . . 'the victims of plaintiff's antitrust violations, the people in the "target area",

are plaintiff's competitors" 407 F.2d at 169.

In the instant case, as in SCM, appellant argues that Warner's conduct is "an integral part of a scheme to restrain, monopolize and intimidate actual and potential exhibitors . . . , all resulting in a destruction and diminution in the value of the plaintiff's property as well as loss of profits that would have been received" (Appellant's brief, p. 20.) The nature of the injunctive relief sought by appellant is telling as well -- appellant sought to enjoin Warner "from suing or threatening to sue plaintiff and any other party or entity involved with the distribution and exploitation of the [Film]." (A 10.) As in SCM, the facts alleged show that an antitrust suit does not lie as between appellant and Warner. Thus, the anticompetitive acts allegedly engaged in by Warner were directed at appellant's distributor Film Ventures and exhibitors of the Film; appellant is not a party to any litigation instituted by Warner nor does appellant even allege that threats of litigation against appellant have been made by Warner. Accordingly, as in SCM, the acts appellant seeks to enjoin relate to

alleged impositions placed by Warner upon appellant's distributor, Film Ventures and exhibitors of the Film. And as in SCM, Film Ventures has commenced a lawsuit against Warner alleging injury by reason of Warner's initiation of copyright infringement actions. Appellant's brief is completely silent on the subject of the Film Ventures Action. This is understandable, for Film Ventures has demonstrated that it is perfectly able and willing to seek adjudication of perceived injuries to its rights and to maintain an antitrust suit, if any be justified. Accordingly, this Court is not faced with a situation where to deny appellant access to this Court will permit Warner to continue its allegedly wrongful conduct without the presence of any person to challenge such conduct.

Subsequent to SCM, this Court confirmed its holding that allegations of intent are insufficient to confer standing upon a plaintiff who is otherwise not within that "target area." In Billy Baxter, Inc. v. Coca Cola Co., supra, this Court affirmed the grant of summary judgment to defendants on standing grounds despite allegations that

the plaintiff was "the intended . . . victim of defendants' illegal conduct." 431 F.2d at 195. This Court held:

"Summary judgment was an appropriate remedy in this case, because the factual questions of motive and intent were not material to the appellant's standing. . . . Assuming the truth of appellant's extensive material factual allegations, they were nevertheless insufficient to show standing to sue. (Emphasis supplied) 431 F.2d at 189.

In so holding, this Court analyzed and dismissed a number of arguments identical to those made by appellant herein. Thus, like appellant herein, Billy Baxter claimed that it was the "target" of defendant's conduct. However, this Court found:

"[T]he only facts which Billy Baxter, Inc. alleges concern the use of improper methods to persuade retail outlets to buy products other than those manufactured and sold by the bottlers paying royalties to appellant. There is no suggestion that any party approached the franchised bottlers and attempted to induce them to terminate their relationship with the appellant, or that any related steps were taken to interfere with the appellant's own franchising business The only "target area" of legitimate activity indicated by the franchisor is the marketing of bottled beverages. (Emphasis supplied) Id. at 188.

Similarly, this Court dismissed Billy Baxter's claim that the "target" was the line of Billy Baxter products rather than the economic activity in which its franchisee bottlers were engaged:

"The appellant's claim to standing is not strengthened by the argument that the 'target' was the line of Billy Baxter products rather than a specific 'area' of economic activity in which the bottlers were engaged. Reference to the products as a target simply points to the self-evidence fact that antitrust violations might do some damage to all the entities connected with their production and distribution. It is still necessary to examine a given plaintiff's role in these processes to determine whether it has the requisite relationship to the type of wrong alleged. Billy Baxter, Inc. was not only one step removed from the link in the production-distribution chain receiving the first impact of the alleged misconduct, but also it cannot claim to be a firm with comprehensive responsibilities for and identification with the beverages. . . . It manufactured no products, and the bottlers did not act as its agents in doing so. The franchisor merely licensed the information needed for the manufacture of the beverages, supplied ingredients which still others had manufactured, and left further production activities to its franchisees." (Emphasis supplied) Id. at 188.

Appellant herein argues that it and Warner are

"competitors" because both "own films for distribution in the United States." (Appellant's brief, p. 16.) This identical argument was raised by the plaintiff in Billy Baxter and rejected by this Court:

"[T]he appellant's standing is not improved by the suggestion that the appellees, Coca-Cola Company and Canada Dry Corporation, were 'its' competitors. The word 'competitor' is not more instructive than the word 'direct,' if either is taken out of the context of the facts of a specific case. . . . [E]ven if the appellees violated the law to help themselves or their franchisees at the expense of the bottlers who sold Billy Baxter products, while knowing that this would also be an effective way of depriving a rival franchisor of royalties, the causal link between the type of violation alleged and an appropriate plaintiff would still be lacking in this suit. An interference with the marketing of beverages may interrupt profitable relationships and thereby harm a party which in effect 'markets' franchises and ingredients, but the connection is not sufficiently compelling to support a treble damage suit." Id. at 188-189.

As for appellant's argument that "the lower court says that whenever a businessman chooses to subcontract the sale of his product rather than hire his own salesman, he can never have standing under Section 4," (Appellant's

brief, p. 7), that is not what the lower court held.

Rather, the lower court held that appellant, like Billy Baxter, had expressly limited itself to an area of the economy outside the "target area" of the alleged offense.

This identical argument was made to and rejected by this Court in Billy Baxter:

"It would be meaningless to state that Billy Baxter Inc. simply elected to carry on 'its' business by authorizing others to bottle and sell the beverages, because the franchisor consciously structured the production-distribution process in a way which limited its own activities in order to gain the benefits of certain specific rights and liabilities. Thus the district court did not enforce a standing rule allocating economic loss to arbitrarily-determined vertical levels of an enterprise, but relied upon the fact that the appellant had expressly limited itself to a level outside the economic target area of the offense." (Emphasis supplied) Id. at 188.

As demonstrated above, in the instant case appellant raises precisely those claims made by Billy Baxter and others and rejected by this Court. Appellant claims that it was the target. Yet, there are no allegations that Warner attempted to induce Film Ventures or the Film's exhibitors to terminate their relationship with the

appellant. To the contrary, as in Billy Baxter the only facts alleged concern the use of allegedly improper methods to persuade exhibitors to show films other than the Film distributed by licensors paying gross box office receipts to appellant. Appellant claims that its Film was the target. Yet, the Warner acts complained of are clearly directed at the Film's distribution and exhibition, not its existence. Appellant argues that it is a competitor of Warner. Yet, it is the distributor of Film Ventures and exhibitors of the Film who are defendants in the allegedly anticompetitive copyright infringement action.

Simply stated, appellant voluntarily and concededly limited its own activities to a level outside the economic target area of Warner's alleged offense. Having done so, it cannot now seek the windfall of treble damages for acts which allegedly injure those who are in the "target area." This is particularly so where that entity, Film Ventures, has already undertaken to right Warner's alleged wrongs.

C. Appellant's policy arguments are without merit.

Apparently recognizing that it has no standing to sue, appellant devotes the balance of its brief to a series of lengthy citations, quotations and policy arguments urging this Court to abandon its previous determinations on the standing issue and adopt theories discussed by other Circuits, law school professors and areas of the law other than the antitrust laws. This Circuit is chided for being "restrictive" while the Ninth and Fifth Circuit approach is lauded as more "liberal." The United States Supreme Court is admired for its approach to standing in challenges to determinations by administrative agencies. This Court is chided for not adhering to the Supreme Court's "admonition" that summary dismissals of antitrust suits be used sparingly.

In short, appellant doesn't like the law in this Circuit. However, appellant's likes and dislikes are not before this Court. What is before this Court is an appellant who is not in the "target area" of the alleged offenses and who, under the established law in this Circuit, accordingly lacks standing to sue.

Appellant's lengthy citations, quotations and policy arguments can be summarized as follows:

1. There are a number of Supreme Court decisions which contain language to the effect that the antitrust laws should be liberally construed.

2. Private treble damage actions are a valuable tool for the enforcement of the antitrust laws.

3. The Supreme Court's decision on standing to challenge an administrative determination is more liberal.

4. If this appellant is denied standing, there is no one who can or will challenge the conduct complained of herein and thus Warner will have been granted immunity from prosecution for its alleged wrongs.

5. If this appellant is denied standing, its alleged damages will go uncompensated.

The first three policy arguments do not control the instant appeal, and the last two are completely erroneous.

As to the first contention, appellant has itself admitted that the cases from which it draws its highly

general quotations do not, outside of their antitrust nature, resemble the instant case. (Appellant's brief, pp. 15, 18-19.) Rather, they provide a general method of approach to a number of lawsuits unrelated to the issues herein. In fact, with respect to appellant's claim that the Supreme Court mandates sparing use of summary dismissals of antitrust suits, the Supreme Court recently made plain (in a non-antitrust context) that

"[a]lthough standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal . . . it often turns on the nature and source of the claim asserted.

* * *

If . . . the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." (Emphasis supplied) Warth v. Seldin, 422 U.S. 490, 500, 501-502 (1975)

Indeed, "[s]ummary proceedings have long been recognized as an appropriate vehicle for disposition of the standing to sue question. SCM Corporation v. Radio Corporation of America, 407 F.2d 166 (Second Cir. 1968); Productive Inventions v. Trico Products Corp., 224 F.2d 678 (Second Cir. 1955)." Mans v. Sunray DX Oil Company,

352 F. Supp. 1095, 1099 (N.D. Okla. 1971.)

Appellant's second policy argument also misses the mark. The importance of private antitrust litigation and methods of supporting such litigation are not at issue in the instant case. Nor, as this Court has recognized in Billy Baxter, Inc. v. Coca Cola Co., supra, are they without limitation. 431 F.2d at 187. Cf., the dissenting opinion of Mr. Justice Black in Bivens v. Six Unknown Named Agents of Fed. Bur. Narcotics, 403 U.S. 388, 427 (1971). It is the appellant's remoteness from any alleged injury that has been determined in the decision below and which is before this Court.

Appellant's third policy argument is equally inapplicable. Appellant cites with approval the Supreme Court's test for standing to challenge administrative agency determinations in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). In the five years since that decision was rendered, only the Sixth Circuit in Malamud v. Sinclair Oil Corporation, 521 F.2d 1142 (6th Cir. 1975) has attempted to apply that test to antitrust standing questions. However, there the Sixth

Circuit was concerned lest it make a determination on the merits of a claim under the guise of assessing standing and was frank in admitting that doubts had been raised about Data Processing's "uncritical application to cases involving non-governmental action." 521 F.2d at 1151.

The reason for such doubts is readily apparent. First, by its own terms, Data Processing was not intended to apply to situations where Congress has specifically conferred standing on a group of litigants, as it has done under Section 4 of the Clayton Act. 397 U.S. at 154. Second, there are considerations in treble damages litigation altogether different from those involved in administrative law. Thus, administrative law cases like Data Processing rarely, if ever, involve damage claims. Such cases traditionally seek injunctive relief. In such circumstances, the number of plaintiffs a defendant confronts is of little consequence to him. As Mr. Justice Marshall aptly stated in Hawaii v. Standard Oil Co., "one injunction is as effective as 100, and, concomitantly, . . . 100 injunctions are no more effective than one." 405 U.S. 251, 261 (1972). On the other hand, the potential impact of a

number of treble damage lawsuits is obviously far greater.*

Moreover, if the appropriate test is the one enunciated in Data Processing, then why has the Supreme Court refused to grant certiorari in any of this Circuit's standing determinations heretofore discussed?

The answer is that, contrary to Malamud's rationale, the merits of an antitrust claim are not at issue in assessing the standing of a private litigant under Section 4. As in any other litigation where a motion to dismiss is made, the complaint's substantive allegations of violation are taken as true. Thus, in Fields Productions, Inc., supra, it was conceded for purposes of defendant's standing motion that it had engaged in block-booking and that such conduct violated Section 1 of the Sherman Act. 318 F. Supp. at 87-88. The sole issue was whether plaintiff was the appropriate party to bring such a suit.

Appellant is also mistaken in claiming that it is the only party who could enforce the antitrust laws in

* Injunctions are also by their very nature prospective; treble damage claims are clearly far different in their nature and effect.

the context of this case. Assuming for present purposes only that the complained of conduct is on its face illegal, Film Ventures has already challenged the very same conduct which is the gravamen of the appellant's Complaint.

To permit this appellant, whose injuries occurred by reason of its relationship to Film Ventures, to maintain this action would undermine not only Section 4 of the Clayton Act, which limits treble damage recovery solely to those persons who have suffered direct injury "by reason of" the alleged violation (see supra, pp. 10-30), but also the clear mandate of this Court and others to avoid multiplicitous litigation.

Finally, appellant's contention that an affirmance of the decision below would effectively deny it recovery of its alleged damages studiously overlooks the existing state court remedy for the unfair competition claims alleged as its second count. Indeed, appellant's claim for actual damages is presently being litigated in the Film Ventures Action. Thus, based upon appellant's alleged arrangement with Film Ventures, if Film Ventures recovers appellant should be entitled to between 12 1/2% and 30%

of that recovery. (Appellant's brief, p. 2.) Accordingly, it is only the windfall of treble damages which is to be denied appellant and not the recovery of any damages actually sustained by it.

Appellant's policy arguments are thus not relevant to the matter here at issue. Moreover, even assuming such relevance, appellant has clearly failed to establish a case which would require application of those principles.

POINT II

THE ACTS COMPLAINED OF ARE EXEMPT FROM ANTITRUST LIABILITY

Under the doctrine enunciated by the Supreme Court in its landmark decisions in Eastern R.R. Pres. Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), United Mine Workers v. Pennington, 381 U.S. 657 (1965) and California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), regardless of intent or purpose, no violation of the Sherman Act can be predicated upon attempts to influence the passage or enforcement of laws. This immunity obtains even if such efforts are motivated by an anticompetitive purpose or desire.

Thus, assuming arguendo appellant's standing under Section 4 of the Clayton Act, Warner's use of litigation to protect its copyrights from infringement is exempt from the antitrust laws and dismissal of the first count of the Complaint is required.

Noerr-Pennington immunity from the antitrust laws is a "judicially implied exception to the general rule that an unlawful purpose may bring otherwise lawful means within the proscription of the Sherman Act." Trucking Unlimited v. California Motor Transport Co., 432 F.2d 755, 757 (9th Cir. 1970), aff'd sub nom. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). In Noerr, supra, the Supreme Court first enunciated the doctrine which prohibits the application of the Sherman Act, whose purpose is to regulate business activity, to political activity, "a purpose which would have no basis whatever in the legislative history of that Act." 365 U.S. at 137.

The alleged antitrust violation in Noerr was a joint attempt by defendants to influence the legislative branch with respect to the passage of laws and the execu-

tive branch as to their enforcement. Notwithstanding "that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed" and notwithstanding that it is "inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury," Id. at 143, the Supreme Court held that no cause of action under the antitrust laws was stated, reasoning:

"[T]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." Id. at 138.

Thereafter, in United Mine Workers v. Pennington, supra, a small mining company brought an antitrust action against larger mining companies and labor unions, alleging a conspiracy in violation of the Sherman Act to cause the Secretary of Labor to set unreasonably high wage rates the ultimate objective of which was to put the small companies out of business. Applying the principles it enunciated in Noerr, the Supreme Court held:

"Joint efforts to influence public of-

officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670.

Subsequently, in California Motor Transport Co. v. Trucking Unlimited, supra, the Supreme Court adopted the Noerr-Pennington principle to the adjudicatory process:

"The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right of petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition. [citations omitted]" 404 U.S. at 510.

Here, the acts complained of fall squarely within the Noerr-Pennington doctrine. The legal actions instituted by Warner to protect its copyrights in the film and promotional matter respecting "The Exorcist" are merely the exercise of its right to petition all branches of government, including the courts, "to advocate [its] causes and points of view respecting resolution of [its] business and economic interests vis-a-vis [its] competitors." California Motor Transport Co. v. Trucking Unlimited, supra, 404 U.S. at 511.

While a "sham" use of the state process exception

to Noerr-Pennington immunity remains, so long as defendants have not sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" or deprived their "competitors of meaningful access to the agencies and courts" the court cannot infer an intent to monopolize from defendant's use of litigation to petition its government. California Transport v. Trucking Unlimited, supra, 404 U.S. at 511-512.

Based upon the instances cited by the California Motor Transport Court as falling within the "sham" exception -- e.g., the monopoly which results from obtaining a patent by fraudulent means, or conspiracy within a licensing authority to eliminate a competitor, or bribery of a public purchasing agent -- the term "sham" in the adjudicatory process is tantamount to misuse or corruption of the judicial process.

Thus, even if this appellant's allegations could be proven, they fall far short of the "sham" exception from immunity. Appellant has not pleaded and cannot show that in taking legal action Warner acted in concert with

any person or "sought to bar [its] competitors from meaningful access to adjudicatory tribunals" so as to "usurp that decisionmaking process." Obviously, neither appellant nor its licensee Film Ventures have been barred from meaningful access to the courts. Not only is the Film Ventures Action pending, but Film Ventures and its co-defendants are actively litigating Warner's copyright infringement actions. In light of the foregoing, no misuse or corruption of the judicial process within the meaning of the "sham" exception from immunity exists.

Appellant's brief says very little concerning the Noerr-Pennington doctrine -- only enough to blithely misstate the Supreme Court's decisions. Appellant suggests that "improper purposes" in the institution of court proceedings are a violation of the antitrust laws. This is precisely the opposite of what the Supreme Court has held. Indeed, in Noerr the Supreme Court emphasized the irrelevance of underlying motivation:

"Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. The Court of Appeals, however, would hold the conduct illegal depending

upon proof of an illegal purpose.
. . . [This holding is not] permitted
by Noerr for the reasons stated in
this case. Joint efforts to influence
public officials do not violate the
antitrust laws even though intended to
eliminate competition. Such conduct
is not illegal, either standing alone
or as part of a broader scheme itself
violative of the Sherman Act," United
Mine Workers v. Pennington, supra,
381 U.S. at 678.

What appellant has chosen to ignore is that Noerr-
Pennington immunity has specifically been granted to deny
antitrust relief against persons who seek judicial pro-
tection of their copyrights. In Alberto-Culver v.
Andrea Dumon, Inc., 466 F.2d 705 (7th Cir. 1972), plaintiff
instituted a copyright infringement action in connection
with defendant's production and distribution of a feminine
hygiene deodorant spray. Defendant pleaded an antitrust
counterclaim, alleging that plaintiff's action was brought
in bad faith simply to impose the cost and burden of liti-
gation on defendant and thereby to exclude it from the
market for feminine hygiene deodorants. The Circuit Court
affirmed the lower court's dismissal of the counterclaim,
holding:

"[P]laintiff's good faith effort to enforce its copyright and trademark is not the kind of exclusionary conduct condemned by §2 of the Sherman Act. The counterclaim was properly dismissed." 466 F.2d at 711.

Similarly, in Edward B. Marks Music Corp. v. Colorado Mag., Inc., 497 F.2d 285 (10th Cir. 1974), cert. denied, 419 U.S. 1120 (1975), the Circuit Court reversed the lower court's finding that plaintiff's copyright infringement action violated the antitrust laws. Citing California Transport, supra, the Circuit Court held:

"[G]roups with common interests may, without violating the antitrust laws, use federal agencies and the courts to advocate their causes respecting resolution of their business and economic interests as opposed to their competitors.

* * *

So, as we said in Semke v. Enid Automobile Dealers Ass'n., 456 F.2d 1361 (10th Cir. 1972), the utilization of the courts in a manner which is in accordance with the spirit of the law continues to be exempt from the antitrust laws. See also Albert-Culver Company v. Andrea Dumon, Inc., 466 F.2d 705 (7th Cir. 1972), where it was held that a good faith effort to enforce one's copyright is not the type of exclusionary conduct condemned

by §2 of the Sherman Act." 497 F.2d
at 291.

While there has been no adjudication of Warner's copyright infringement actions, the court's findings on Warner's motion for pendente lite injunctive relief in the action pending against Film Ventures in the Central District of California belie any suggestion that Warner's conduct violates the antitrust laws. In that action Warner, among other things, has complained that Film Ventures and its co-defendants used two advertisements in promoting the Film which violate Warner's copyrights in advertisements created to promote "The Exorcist." With respect to one advertisement, the court agreed with Warner's contention that "this advertisement was properly copyrighted" and granted an injunction against its further use by defendants, holding: "[t]he scenes are identical and obviously infringe [Warner's] rights."

With respect to the second advertisement, the court agreed that Warner's claim "has merit" and directed defendants "to forthwith withdraw the use in any way or manner" of the advertisement:

"It is . . . a practice of unfair competition on the part of the exhibitors of 'Beyond' a picture having no religious theme and which at no time portrays a crucifix, to prominently (or at all) display a crucifix in its advertising of the picture. There is thus created a suggestion that 'Beyond' is a sequel to 'The Exorcist' and possibly that it was produced by the same craftsmen who skillfully produced 'The Exorcist', and that it might be a film of the superior quality of 'The Exorcist', which it is not." (A 40)

While appellant choses to characterize Warner's lawsuit as "baseless" and "sham", such characterizations are of no import. In Adolph Coors Co. v. A&S Wholesalers, Inc., [1975] Trade Reg. Rep. (CCH) ¶60,187 (D. Col. 1975), plaintiff sued to enjoin defendant from purchasing Coors beer in Colorado and transporting it to North Carolina where it wholesaled the beer to retail stores. Plaintiff was granted pendence lite injunctive relief and defendant asserted an antitrust counterclaim alleging that plaintiff instituted the lawsuit "without probable cause" and to "suppress competition." Notwithstanding the fact that Coors' complaint was dismissed by the court, the court dismissed defendant's antitrust counterclaim "insofar as it

was grounded on Coors' initiation of the lawsuit" based on the Noerr-Pennington doctrine:

"Plaintiff's claims were not 'baseless,' although so characterized by the defendant. The fact that the parties view the facts differently and urge that different legal conclusions flow from these facts does not indicate an attempt to 'mislead' the court as defendant contends. To be sure, the plaintiff sought and we granted a preliminary injunction which prohibited A&S from conducting its business for a substantial period of time. Yet, so long as the plaintiff used the adjudicatory process and powers and genuinely sought a decision respecting resolution of its business affairs vis-a-vis the defendant, its purpose to suppress competition by use of those processes is not within the purview of the Sherman Act." Id. at p. 65,634.

In view of the foregoing, even if appellant has standing to sue, Warner's institution of copyright infringement actions clearly falls within Noerr-Pennington immunity from the antitrust laws and mandates dismissal of the first count of the Complaint.

POINT III

THERE HAS BEEN NO ATTEMPT TO
MONOPOLIZE A PART OF TRADE OR
COMMERCE WITHIN THE MEANING
OF THE SHERMAN ACT

In order to maintain an action under the Sherman Act, plaintiff must plead and prove an attempt by defendant to monopolize a "part" of trade or commerce. Stated otherwise, plaintiff must plead and prove an identifiable relevant market over which defendant could have a monopoly.

In United States v. E.I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377 (1956), the Supreme Court stated the criteria for determining relevant market. In doing so, it stated that the relevant market "is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered." 351 U.S. at 404 (1956). The criteria enunciated by the Supreme Court in du Pont have consistently been followed since that time.

The application of these principles relating to relevant market are best understood in the factual context of the cases in which they have been applied.

In du Pont, supra, a monopoly of the market in cellophane was alleged. The du Pont Court held that the relevant market was not cellophane alone but the entire field of flexible packaging materials. Similarly the Federal Trade Commission in Brillo Manufacturing Co., 54 FTC 1905 (1958), a Clayton Act case, stated that its hearing examiner, "in concluding as matter of law that industrial steel wool was the relevant market erred in basing his determinations solely on the fact that these were the wares being produced by the acquired and acquiring companies." 54 FTC at 1906.

"The test instead is whether these products are shown by the facts to have such peculiar characteristics and uses as to constitute them sufficiently distinct from others to make them a 'line of commerce' within the meaning of the Act. [citing du Pont.] That the acquired and acquiring corporations both made industrial steel wool was only one circumstance to be considered." Id.

It is clear from cases such as du Pont and Brillo that in determining the proper scope of a relevant market for Sherman Act purposes, the court's task is to find the area of effective competition. In doing so, its task is neither limited to physical attributes nor foreclosed from

inquiry into the competitive situation.

This appellant alleged attempted monopolization in a part of trade or commerce limited to motion pictures detailing the "'demonic possession' of individuals."

(¶11.) As the following discussion demonstrates, films dealing with a particular subject matter do not constitute a relevant market within the meaning of the Sherman Act. While a determination of relevant market is generally a factual one, this appellant alleges a market limited to a single motion picture produced by Warner which has a subject matter in common with a single motion picture in which appellant has an interest. This cramped construction of a product market precludes the possibility that on any factual showing appellant can bear its burden of proving an attempt to monopolize a part of commerce.

As in du Pont and Brillo, supra, appellant pleads a relevant market based solely on the "physical attribute" which "Beyond the Door" and Warner's "The Exorcist" allegedly have in common -- the theme of demonic possession of individuals. However, a determination of relevant market for Sherman Act purposes mandates an

inquiry into the area of effective competition faced by the motion pictures in question. In view of the panoply of films, theatre and television programming which the entertainment industry annually provides, including many dealing with the concept of demonic possession, and which actively compete with one another for a share of the consumer's entertainment dollar, appellant's relevant market allegations border on the absurd.

In United States v. Columbia Pictures Corp., 189 F. Supp. 153 (S.D.N.Y. 1960), a Clayton Act case, the government attempted to persuade the court that a distribution agreement had the effect of substantially lessening competition in a "line of commerce" consisting of the distribution of all feature films to television stations. The district court rejected the government's contentions, holding:

"[T]he relevant line of commerce is broader than feature films. It encompasses all forms of television programming material, including syndicated film produced specifically for television, videotaped and live shows, cartoons and shorts." 189 F. Supp. at 183.

The district court also found:

"[T]here is an absence of any peculiar characteristic or use sufficient to constitute feature films a separate and distinct product.

. . . [T]here is a high degree of interchangeability between various types of television programming, thereby reflecting strong inter-product competition." 189 F. Supp. at 187.

This appellant pleads a product market significantly more narrow than that rejected by the district court in Columbia Pictures, supra. Not only is the market here alleged restricted to feature films, it is further restricted to feature films dealing with a particular subject matter. If all feature films, irrespective of their subject matter, is too narrow a market for anti-trust purposes, feature films dealing with a particular subject matter is clearly not a part of trade or commerce within the meaning of the Sherman Act.

We submit that it would be an abuse of discretion for this Court to permit a long and expensive antitrust litigation to go forward where the relevant market pleaded is so limited as to preclude the possibility that on any factual showing appellant can bear its burden of proving

an attempt to monopolize a part of trade or commerce.
Simply stated, appellant can neither plead nor prove a
relevant market. Accordingly, appellant's first count
should be dismissed.

CONCLUSION

The judgment below should be affirmed in all
respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 77-7076

ZIMMEL ASSOCIATES, a New York Limited
Partnership,

Plaintiff-Appellant,
against

WARNER BROS. INC.,

Defendant-Appellee.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 98-30 67th Avenue,
Roosevelt Park, New York 11374

That on the 19th day of May 19 77 deponent served the annexed Brief
of Defendant-Appellee
on Berg & Duffy
attorney(s) for Plaintiff-Appellant
in this action at 3000 Marcus Avenue, Lake Success, New York 11040
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me this
19th day of May, 1977

Annette C. Cyran

Notary Public

ANNETTE C. CYRAN

Notary Public, State of New York

No. 4639197

Qualified in Kings County

Certificate filed in New York County

Commission Expires March 30, 1978

Dale L. Stein

The name signed must be printed beneath

Dale L. Stein